No. 75-1831

In the Supreme Court of the United States

OCTOBER TERM, 1976

AUBREY LEE ROBINSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. B) and the district court (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on April 27, 1976, and a petition for rehearing was denied on May 21, 1976 (Pet. App. A). The petition for a writ of certiorari was filed on June 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's denial of petitioners' motion to reveal the identity of an informant violated their Sixth Amendment right to confrontation.

2. Whether evidence seized when petitioners were arrested should have been suppressed.

3. Whether the evidence was sufficient to support the conviction of petitioners Dawna Robinson and Aubrey Robinson.

STATEMENT

Following a bench trial in the United States District Court for the Southern District of Texas, petitioners were convicted of possessing approximately 154 pounds of marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioners Willie Winkles and Aubrey Robinson were each sentenced to three years' imprisonment to be followed by four years' special parole. Petitioner Dawna Robinson was placed on four years' probation under the Youth Corrections Act. The court of appeals affirmed *per curiam* (Pet. App. B).

1. On September 11, 1974, Special Agent Murray of the Drug Enforcement Administration ("D.E.A.") in McAllen, Texas, received a call from an informant who on more than fifteen occasions had provided reliable information on criminal matters (Tr. 7-9). The informant told Murray that he had received information that petitioner Aubrey Robinson and three other persons had gathered at the Palm View Motel in McAllen, Texas, in rooms 209 and 210, for the purpose of "exporting" a quantity of marihuana from Texas to Alabama. He also stated that they were driving a 1972 black over white Plymouth bearing Alabama license plates numbered IC 64529 and that they had access to another vehicle bearing Texas license plates numbered KKX 498 (Tr. 9). The informant told Murray that a fifth man had been staying at the motel but had departed on a commercial flight from an international airport (Tr. 11). In addition, the informant mentioned the names Blanco and Lionel Herrera, the latter

of whom was a suspected narcotics dealer (Tr. 10, 25). A subsequent check of the Texas license number described by the informant showed that the vehicle was owned by Blanco Herrera (Tr. 9-10, 25).

Within minutes after the telephone call Murray went to the motel and observed the black over white 1972 Plymouth bearing the plates described by the informant (Tr. 11). Murray verified that rooms 209 and 210 had been signed for by petitioner Aubrey Robinson (Tr. 18). He then returned to his office and enlisted surveillance assistance from Special Agent Powell (Tr. 11-12). Powell commenced surveillance and observed the Plymouth leave the motel occupied by four people (Tr. 12, 14, 27). He subsequently lost sight of the vehicle and radioed this fact to Murray (Tr. 12). Special Agent Moore overheard the radio conversation and offered assistance (Tr. 13).

2. At approximately 6:00 p.m., the D.E.A. office in San Antonio relayed information to Murray that Moore had seen the Plymouth (Tr. 14). Moore followed the Plymouth for approximately 10 miles (Tr. 33). Eventually the Plymouth stopped along the side of the highway (Tr. 33). Through binoculars Moore noticed that the two persons in the front seat were turned toward and talking to the passenger in the back seat who was looking out of the rear window in Moore's direction (Tr. 34). The Plymouth then took off at a high rate of speed, and Moore lost sight of it (Tr. 34-36). When Moore increased his speed to approximately 110 miles per hour the Plymouth came into his view (Tr. 36-37). At that point he observed four occupants in the vehicle (Tr. 17, 28, 37). The surveillance team of Moore and Murray was joined by special agents Dracoulis and Hester, who decided to stop the vehicle (Tr. 17, 27).

3. After the agents stopped the vehicle and removed the occupants, Dracoulis asked them for the keys to the trunk (Tr. 18, 43-44). Petitioner Willie Winkles, the

driver of the car (Tr. 43), told Dracoulis that someone had taken the keys while they were loading (Tr. 50-51). One of the agents then entered the trunk through the back seat. There, he discovered bricks of marihuana and burlap bags and a paper sack filled with marihuana (Tr. 47-48). Items of clothing belonging to each petitioner were also found in the trunk (Tr. 49-50). Willie Winkles suggested that the person who had stolen the keys left the marihuana in the trunk (Tr. 44-45).

All four occupants were arrested. Later more than $1,000 in cash was discovered on petitioner Aubrey Robinson (Tr. 51). Papers commonly used in rolling marihuana cigarettes were discovered in petitioner Dawna Robinson's purse. In petitioner Willie Winkles' purse marihuana sweepings, which she claimed to be tea, were discovered (Tr. 52, 54).

ARGUMENT

1. Petitioners contend the trial court violated their Sixth Amendment right of confrontation by denying their motion for disclosure of the identity of the D.E.A.'s informant. They assert such disclosure was required by their claim that there was no probable cause to stop and search their vehicle. But in *McCray* v. *Illinois*, 386 U.S. 300, 312-313, this Court held that the identity of an informant need not be disclosed for purposes of determining whether there was probable cause for an arrest or search, if the arresting officers give credible evidence that the informant was known to be reliable and that they had made the arrest in good faith upon the information he supplied. The Court rejected the contention that any Sixth Amendment rights are at stake in such situations (386 U.S. at 313-314):

> The petitioner does not explain precisely how he thinks his Sixth Amendment right to confrontation and cross-examination was violated by Illinois'

recognition of the informer's privilege in this case. If the claim is that the State violated the Sixth Amendment by not producing the informer to testify against the petitioner, then we need no more than repeat the Court's answer to that claim a few weeks ago in *Cooper* v. *California*:

> "Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State did not produce the informant to testify against him. This contention we consider absolutely devoid of merit." *Ante*, p. 58, at 62, n. 2.

On the other hand, the claim may be that the petitioner was deprived of his Sixth Amendment right to cross-examine the arresting officers themselves, because their refusal to reveal the informer's identity was upheld. But it would follow from this argument that no witness on cross-examination could ever constitutionally assert a testimonial privilege, including the privilege against compulsory self-incrimination guaranteed by the Constitution itself. We have never given the Sixth Amendment such a construction, and we decline to do so now.

Since the arresting officers here established that the informant had supplied accurate information many times before and therefore was known to be reliable, and there is no question concerning the officer's good faith in making the arrest, petitioners' claim is foreclosed by this Court's decision in *McCray*.

2. Petitioners also contend that there was no probable cause for their arrests because the information acquired by the arresting officers after receiving the tip from the informant did not corroborate that petitioners had committed or were in the process of committing a

felony. That contention is simply factually inaccurate. Petitioners' attempt to escape the surveillance car by driving at an extremely high speed after they apparently had observed it confirmed the information that a crime had been or was in the process of being committed. The arresting officers' observation of petitioners' guilty flight satisfied the requirement, stated by this Court in *Whiteley* v. *Warden*, 401 U.S. 560, 567, that "the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or * * * were in the process of committing the felony." Since the arrests were lawful, the search of the car was also. *Chambers* v. *Maroney*, 399 U.S. 42.

3. Petitioners Aubrey Robinson and Dawna Robinson contend that the government's evidence was insufficient to support their convictions. Petitioners presented no defense. Viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), the government's evidence showed that both petitioners, as well as the driver of the vehicle, were in possession of the 154 pounds of marihuana found in the trunk. There was evidence that all three petitioners participated in loading the trunk (Tr. 50-51). The luggage of each petitioner was found locked in the trunk with the bags containing marihuana and the loose bricks of marihuana (Tr. 47-50). Moreover, cigarette papers of a kind commonly used to roll marihuana cigarettes were found in the purse of Dawna Robinson and more than $1,000 in cash was found on Aubrey Robinson (Tr. 51-52).[1]

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[1]This case is factually distinguishable from *United States* v. *Cantu*, 504 F. 2d 387 (C.A. 5), upon which petitioners rely. In *Cantu* the Fifth Circuit concluded that, on the facts there, nothing had connected the passengers in a car carrying marihuana with possession of the marihuana. Here the convictions of the Robinsons were supported by evidence other than their mere presence in the car.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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